Filed 2/9/04 P. v. Choinski CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY CHOINSKI, Defendant and Appellant.	B162139 (Los Angeles County Super. Ct. No. BA221417)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob S. Bowers, Jr., Judge. Affirmed in part, reversed in part.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Kyle S. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Johnny Choinski challenges his burglary and kidnapping convictions on the grounds the evidence was insufficient to support a kidnapping conviction, his trial attorney rendered ineffective assistance of counsel, and the trial court erred by refusing a requested instruction and restricting defense counsel's argument. We conclude the evidence does not support appellant's kidnapping conviction and the trial court prejudicially erred by refusing to instruct the jury that a person may not burglarize one's own home.

BACKGROUND AND PROCEDURAL HISTORY

Appellant, who had a history of violence against his wife Lidia, climbed a ladder to her balcony and entered her apartment. He displayed a gun, struck her with it, and threatened to kill her. Lidia escaped while appellant used the bathroom and called the police. After the police arrived, they heard gunshots coming from the apartment. Appellant then appeared at the front door of the apartment with a gun, which he first pointed at himself, and then at the police. Several officers shot appellant.

A jury convicted appellant of four counts of assault with a firearm, first degree burglary, criminal threats, corporal injury to a spouse, grossly negligent discharge of a firearm, and kidnapping. With respect to the burglary, criminal threats, corporal injury to a spouse, and kidnapping charges, the jury found appellant personally used a gun. The court sentenced appellant to prison for 28 years, 8 months.

DISCUSSION

1. Evidence of substantial movement of the victim was insufficient to support appellant's kidnapping conviction.

Appellant contends the evidence was insufficient to support his kidnapping conviction because it showed he only moved Lidia from the bedroom to the living room within the apartment. He argues this movement was insufficient to constitute the substantial movement required for a kidnapping conviction.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

"Simple" kidnapping requires proof that appellant unlawfully moved a person by the use of physical force or fear, without the person's consent, and the movement of the person was substantial in character. (Pen. Code, § 207, subd. (a); *People v. Martinez* (1999) 20 Cal.4th 225, 235; *People v. Jones* (2003) 108 Cal.App.4th 455, 462.) The substantiality of movement is not determined by distance alone, but by the character of the movement, as determined from the totality of the circumstances. (*People v. Martinez*, *supra*, 20 Cal.4th at p. 237.) Relevant factors include the victim's vulnerability and whether the movement increased the risk of harm, decreased the likelihood of detection, and increased the danger inherent in a victim's foreseeable escape attempts or the kidnapper's enhanced opportunity to commit additional crimes. (*Id.* at pp. 237-238.)

Lidia testified appellant moved the ladder that was outside the apartment building and entered her second-floor apartment by way of the balcony adjacent to the bedroom. A sliding glass door opened from the bedroom to the balcony, but Lidia never locked it. Lidia was in the bedroom at the time appellant entered. When appellant entered, he pointed the gun at her, ordered her into the living room, and demanded liquor. He led her "from the bedroom through the small hallway to the kitchen," where she retrieved a bottle of cognac and gave it to him. Appellant and Lidia then went into the living room, where he locked the front door "on three locks." Although photographs of the apartment were introduced at trial, the record contains no evidence of the size of the rooms or the distance between them. Although the distance appellant moved Lidia is uncertain, it is unlikely it was great, as it was all within the same apartment, from one room to another that was just "a small hallway" away, then into an apparently adjacent room.

More importantly, the record does not establish any grounds to believe Lidia was more vulnerable in the living room than in the bedroom. Respondent argues the bedroom

provided Lidia a better possibility of summoning assistance or escaping because the apartment's parking structure was visible from the balcony, and the door to the balcony was not locked, whereas appellant locked the front door "on three locks." Lidia testified she could see part of the parking structure from the balcony. However, the evidence did not provide any basis for concluding that people in the parking structure or elsewhere would be able to see or hear Lidia if she were on the balcony. Moreover, calling for help from the balcony would probably not have assisted significantly. Even assuming she managed to call for help without appellant hearing her and people outside heard her distress call, she still would have been inside the apartment when the police or other rescuers arrived.

Appellant's actual behavior both before and after the police arrived suggests it would have been extremely dangerous for Lidia to remain in the apartment, even with help on the way or at the scene. Before the police arrived, he pointed the gun at Lidia, repeatedly threatened to kill her and then himself, struck her with the gun, and showed her that it was fully loaded. After the police arrived, appellant went on a rampage inside the apartment, threw things around and fired his gun. Lidia testified that photographs of the crime scene depicted a computer and other equipment "thrown on the ground and demolished" and gunshots through a television, the bathroom mirror, the toilet, the closet door, and the sliding glass door to the balcony.

There was no evidence the sliding door to the balcony was unlocked during the commission of the crimes. Lidia testified she never locked the door, but she was not asked and did not testify appellant did not lock it after he came in. While counsel's questions suggested the lock was broken, Lidia's responses did not support that assertion. Lidia actually escaped through the front door, after unlocking the three locks. Respondent's suggestion that the locked front door rendered escape from the living room "impossible" is therefore contradicted by the facts.

Indeed, the move from the bedroom to the living room facilitated Lidia's escape. To escape from the bedroom, Lidia would have had to climb from her balcony and down

the ladder, or move into the living room and escape through the front door. Climbing from the balcony and down the ladder would have been more perilous and probably have consumed more time than going through the front door and down the stairs. Running from the bedroom into the living room to go through the front door would have consumed more time and may have required passing by the bathroom, possibly alerting appellant to her escape attempt. Her actual escape from the living room through the front door was successful and permitted her to grab her purse and phone, which were located near the front door. She used her phone to call the police. Therefore, the actual move from the bedroom did not make Lidia more vulnerable, increase the risk of harm, decrease the likelihood of detection, or increase the danger inherent in her foreseeable escape attempt. Moreover, the evidence does not suggest any reason to conclude the movement from the bedroom to the living room enhanced appellant's opportunity to commit additional crimes.

In short, even viewing the evidence in the light most favorable to the judgment, the record does not support a conclusion that appellant's movement of Lidia from the bedroom to the living room was substantial in character. Accordingly, appellant's kidnapping conviction is not supported by substantial evidence, and therefore must be reversed. As a result, we do not need not to address appellant's ineffective assistance of counsel claim, which pertains only to the kidnapping conviction.

2. The trial court prejudicially erred by refusing to instruct that a person cannot burglarize one's own home.

Lidia testified appellant did not live with her at the time of the charged crimes. She admitted, however, he lived at the apartment on weekends and some of his possessions, including his immigration documents, were in the apartment. She also admitting telling an investigating officer that appellant "had lived with [her] for about one to two months." Appellant testified he had been living in the apartment with Lidia for more than a year, and the electricity and gas services were in his name. They went through "stormy periods" where he was "out of the house, in the house, out of the

house." He lost his keys to the apartment several weeks earlier while sleeping on the sofa. He often spent the night at the apartment, but had not been inside it since he lost the keys and had been sleeping at his parents' home. He entered the apartment by means of the ladder because there was no doorbell and the security door downstairs prevented him from knocking on the front door of the apartment. Lidia asked him what he was doing there and he said he came to get the rest of his things. She said that was "no problem." Appellant thought Lidia was surprised to see him because he had told her the previous Friday that he would come over on Saturday, but he did not arrive until Tuesday. He denied bringing a gun with him. It was one of his possessions that was already in the apartment.

Appellant asked the trial court to instruct the jury that a person cannot be guilty of burglarizing his own home, so if the jury found the apartment was appellant's home, it should acquit him of burglary. The court refused to give the instruction stating it believed this was an incorrect statement of the law.

During closing argument, defense counsel stated that "a person cannot be guilty of burglarizing his own home." The trial court sustained the prosecutor's objection. Defense counsel later repeated the argument, and the court interrupted and told the jury that counsel's argument was incorrect. Defense counsel subsequently told the jury he had misspoken, and stated appellant was not guilty of burglary if he entered the home only to recover his own property.

Appellant contends the trial court erred in refusing to instruct as requested and in precluding counsel from arguing that a person cannot burglarize one's own home. He argues that these errors violated due process and his rights to a jury trial and the effective assistance of counsel.

A trial court must give a requested instruction only if it is supported by substantial evidence, i.e., evidence sufficient to deserve jury consideration. (*People v. Marshall* (1997) 15 Cal.4th 1, 39.) The court should not weigh the credibility of witnesses in determining whether substantial evidence supports a theory. (*People v. Flannel* (1979)

25 Cal.3d 668, 684 overruled on other grounds by *In re Christian S.* (1994) 7 Cal.4th 768.)

Burglary involves the act of unlawful entry accompanied by the specific intent to commit grand or petit larceny or any felony. (Pen. Code, § 459; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041.) First degree burglary requires entry into an inhabited dwelling house. (Pen. Code, § 460, subd. (a).) However, a person may not be convicted of burglarizing his own home. (*People v. Gauze* (1975) 15 Cal.3d 709, 714.)[1] Accordingly, if the jury concluded that appellant had an "unconditional possessory right to enter" (*People v. Pendleton* (1979) 25 Cal.3d 371, 382) the apartment, it would constitute a complete defense to the charge of burglary.

Here, appellant's testimony constituted substantial evidence that the apartment was his home, although he appeared to be in the process of moving out and living elsewhere at least part of the time. Appellant's testimony was sufficient to require the court to instruct, as requested, that if he had an unconditional right to enter the apartment, he could not be convicted of burglary. Of course, Lidia's testimony was largely to the contrary. However, the question was a factual one to be resolved by a properly instructed jury. The court erred by refusing the requested instruction.

The first step in determining the prejudicial effect of this error is deciding whether *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson* (1956) 46 Cal.2d 818, 836, provides the appropriate standard. Because the *Chapman* standard applies only to federal constitutional errors, the question is whether the failure to instruct constitutes federal constitutional error, as appellant contends. We conclude it does.

Fundamental fairness, as guaranteed by the Sixth Amendment and the Due Process Clause of the federal constitution, requires that criminal defendants are afforded a meaningful opportunity to present a complete defense. (*California v. Trombetta* (1984)

---

1 Respondent's argument that this rule has been "narrowed in subsequent cases," is false. So, too, was the court's conclusion that the requested instruction was contrary to the law.

467 U.S. 479, 485.) The right to present a defense includes the introduction of admissible evidence. In many cases, however, absent instruction on the elements of a defense or its effect, the jury will not understand how to apply the defense theory or may misunderstand the elements constituting the defense. For example, absent instruction, the jury could not have known that a person may not be convicted of burglary for entering his own home with the intent to commit a felony. Indeed, the court's comments to the jury in response to defense counsel's argument on this principle clearly informed the jury that a person could be convicted of burglarizing one's own home. Thus, the jury may have believed appellant's testimony regarding the status of the apartment, but considered it essentially irrelevant because the court's instructions and comments provided no avenue for applying this fact with respect to the burglary charge. The constitutional right to present a defense therefore requires instructions that permit the jury to apply the defense, for example, by informing the jury of the elements and effect of the defense where the elements and effect are not obvious. Accordingly, we hold that a failure to instruct or misinstruction undermining an appellant's right to submit to the jury a defense for which he has an evidentiary foundation constitutes federal constitutional error subject to *Chapman* harmless error analysis.

Under *Chapman*, an error is harmless if it appears beyond a reasonable doubt that it did not contribute to the jury's verdict. (*People v. Flood* (1998) 18 Cal.4th 470, 504.) An inference that appellant did not have an unconditional possessory right to enter the apartment was supported by Lidia's testimony that appellant did not live there on the date of the charged crimes, his unorthodox means of entry, and his admission he had not been in the apartment for three weeks. On the other hand, Lidia admitted appellant at least lived in the apartment on weekends and some of appellant's possessions remained in the apartment. The admissions tend to support an inference appellant had at least some possessory claim to the apartment. Appellant's testimony that he lived in the apartment there, his name was on some of the utility accounts, and he owned a set of keys to the apartment but had lost them supported an inference he had an unconditional possessory

right of entry to the apartment. His testimony regarding a "stormy" relationship with Lidia provided a plausible explanation for his absence from the apartment and part-time residence at his parents' home. Based upon the conflict in the evidence, we cannot conclude, beyond a reasonable doubt, that the jury would have rejected appellant's claim that the apartment was his home, as well as Lidia's. Accordingly, the court's failure to instruct on the principle set forth in *Gauze* was not harmless.

Similarly, the trial court erred by precluding counsel from arguing that the jury should acquit appellant of burglary because the residence he entered was his own and telling the jury that counsel's statement of this principle of law was incorrect. Given our conclusion regarding the prejudicial effect of the court's instructional error, we need not address the potential prejudice of the court's erroneous limitation on argument.

DISPOSITION

Appellant's kidnapping (count 11) and burglary (count 7) convictions are reversed. The kidnapping charge may not be retried. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.